

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD BELKE,

Defendant and Appellant.

C059589

(Super. Ct. No. 07F10587)

Defendant Ronald Belke was charged with one count of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a))¹ and two counts of illegal possession of ammunition (§ 12316, subd. (b)(1)). The information also alleged defendant had served three prior prison terms. (§ 667.5, subd. (b).)

After defendant's motions to suppress evidence (§ 1538.5) and to set aside the information (§ 995) were denied, he pled guilty to one count of illegal possession of ammunition and

¹ Hereafter, undesignated statutory references are to the Penal Code.

admitted two prior prison terms, with a stipulated total state prison term of four years. The trial court thereafter imposed that sentence (the midterm of two years on count two, plus two years for the prior prison terms).

Defendant contends his motions should have been granted because the officers' search exceeded the scope of a lawful protective sweep. We disagree and shall affirm.

BACKGROUND

A. The Motion to Suppress

Defendant's section 1538.5 motion asserted that the warrantless search of his bedroom could not be justified by exigent circumstances, and that it was unlawful as a protective sweep. He contends the officers had no reason to believe additional suspects were present; thus, the seizure of evidence from the bedroom could not be justified under the plain view doctrine because the officers had no legal right to be where they were. The People replied that the search was justified, *inter alia*, as part of a protective sweep of the residence.

Evidence at the Preliminary Hearing

Defendant's motion was heard at the preliminary hearing, at which some of the arresting officers testified. Defendant did not testify.

Sacramento County Sheriff's Deputy Robert White, a member of the department's Central Division Problem Oriented Policing Team, which dealt largely with narcotics, testified as follows:

Along with four other deputies, Deputy White went to a one-story single-family dwelling on Fernridge Drive in Sacramento

County in November 2007, around 5:13 p.m., responding to a citizen complaint about drug activity at the house. The deputies had already determined that J.B., a resident of the house, was on searchable probation. They were in uniform and armed.

Deputy White and Deputy Dustin Silva went to the front door, while other deputies went elsewhere. The front door was open, but a metal security door in front was locked. The deputies could see light inside through the windows.

Deputy White knocked on the security door and announced that deputies from the sheriff's department had come to conduct a probation search, naming J.B. as the occupant on searchable probation. He saw several people inside, including a female later identified as B.A., a male later identified as T.C., and defendant. The female was coming from down the hallway toward the front door; the males were off to the right in the living area.

Deputy White could not see the entire interior of the house. He could see only part of the living room, a hallway leading back to the bedrooms, and "a little bit" of the kitchen area.

After Deputy White's announcement, the males approached the door. One of them, later identified as defendant, was holding an object Deputy White could not make out. Deputy White did not afterward form an opinion as to what the object was or see defendant do anything with it.

The female, apparently coming down the hallway from a bedroom, had a pit bull with her. She moved back toward the hallway, where it was rather dark, then came forward toward the door.² The pit bull remained at the door during the ensuing conversation.

The female and defendant told the deputies loudly and repeatedly that nobody in the house was on searchable probation and the deputies could not come in. (Defendant started to walk toward the kitchen after saying this, but stopped on command.) After 30 seconds to a minute, Deputy White said he would force entry and started to pull on the door. The occupants then let the deputies in.

The fact that the persons Deputy White had seen were standing in a position which obscured his view of the rest of the house caused him concern because he did not know what was going on in the house. He thought people could be hiding in the back, arming themselves, or disposing of evidence. The female's initial movement back down the hallway caused Deputy White concern for similar reasons.³

After Deputies White and Silva entered, Deputy White went into the living room area, a few feet to the right of the door.

² On cross-examination, Deputy White admitted that his written report did not mention that the female had walked anywhere.

³ Deputy White was asked to draw the overall floor plan of the house and to identify specific areas on the drawing. This drawing is not in the appellate record.

He now saw another person inside, a male sitting on a couch in the living room.

Some of the deputies detained the persons they had encountered, while other deputies conducted a protective sweep of the house. Deputy White decided this was necessary as soon as they entered because of "[the occupants'] objections and the nature of what was going on in the house within just -- overall the way things were going down. Plus my experience with what happens in narcotic houses and things like that." He did not automatically conduct protective sweeps in "narcotics sales house[s]": "It happens frequently but it's on a case to case basis." He did not have any specific information that any resident of the house had a history of assaultive conduct or aggression toward law enforcement.

As Deputy White conducted the protective sweep of the unlocked areas, defendant impeded the deputies by verbally confronting them and objecting to their presence, while declining to tell them who he was. He was agitated and was agitating the other occupants. At some point, Deputy White handcuffed him in the living room.

During the initial part of the protective sweep, the deputies did not find any other persons or weapons in the house. However, they discovered that one bedroom was locked with a deadbolt lock. Asked whose room it was, the female was not forthcoming. Because she had initially come from that part of the house, Deputy White was concerned about whether someone might be hiding in the locked room; he thought there would have

been time after the deputies entered for someone to have gone in there, barricaded himself inside, and armed himself.

As a narcotics investigator, Deputy White frequently encountered firearms in drug houses. In this situation, he was especially concerned about that danger because the occupants had delayed the deputies' entry even after being told there was a lawful basis to search.

Sergeant Aguilar, in charge of the team, said they should kick the door in.⁴ Defendant then said he had a key. Deputy White went out to his patrol car before the door was opened.

Deputy Abbott came out with defendant, whom Deputy White placed in the back of his patrol car. Defendant admitted that the locked bedroom was his.

Deputy White reentered the house and went into the now unlocked bedroom, where he met Deputy Jeffrey Massaghi. Deputy Massaghi said that while doing a protective sweep of the room, he had found nine-millimeter ammunition, narcotics pipes, and marijuana in plain view on the dresser. Deputy White observed these items for himself.

Returning to the patrol car, Deputy White obtained defendant's consent to search the room. Defendant said the gun that went with the ammunition was under the pillow on the bed; Deputy White found it there, loaded and chambered.

⁴ Deputy White estimated that "[p]robably five minutes" had elapsed since the officers' arrival when Sergeant Aguilar made this remark.

After Deputy White arrested defendant and obtained a waiver of his rights, defendant said he possessed the gun and ammunition because people had threatened him.

Deputy Massaghi testified as follows:

He left his initial position at the side gate of the house and went to the front door when he heard the argument going on there. After about 30 seconds, the deputies gained entry. Based on the circumstances at the door, Deputy Massaghi knew immediately that they would have to do a protective sweep. He and Deputy Silva began it.

About a minute after entering the house, Deputy Massaghi found that the bedroom at the far end of the hall was locked; he told his partners. Defendant said it was his door. Sergeant Aguilar demanded the key. Defendant replied that he was not on probation or parole and the deputies had no authority to enter. Deputy Massaghi did not remember if Sergeant Aguilar told defendant the door would be broken down, but eventually defendant gave him the key. As far as Deputy Massaghi could recall, defendant was not handcuffed then.

Deputy Silva opened the door and Deputy Massaghi went in ahead of him. While sweeping the room for other persons, Deputy Massaghi saw two narcotics pipes and a nine-millimeter round of ammunition on a dresser, and two holsters on top of another dresser, all in plain view.

Deputy Silva testified as follows:

Approaching the front door, he saw a female sitting on a couch in the living room to the right of the door. After the

deputies knocked and announced their intent to search, she stayed where she was.

Deputy Silva saw B.A. come out of a far back bedroom, go back into the bedroom for 10 or 15 seconds, and come out again; when she went back into the bedroom, he lost sight of her. Then she came to the door, along with a dog.

Deputy Silva also saw a male walk in front of the door from the living room toward the kitchen, holding something unidentifiable in his left hand. The deputies ordered him back to the living room, but he stayed where he was.

For 45 seconds to a minute, the people inside refused to open the door. They insisted that J.B. was not there, no one who was there at that time was on searchable status, and they did not want the officers to come in.

After obtaining entry, the deputies began a protective sweep of the house for officer safety; they were not sure how many people were in the house and they wanted to avoid ambush.⁵ The delay in allowing entry concerned Deputy Silva because the occupants could have had many reasons for stalling, including the desire to hide someone. B.A.'s going and coming from the back bedroom while the deputies were at the front door also concerned Deputy Silva and made a protective sweep seem necessary.

⁵ Before going to the house, Deputy Silva had obtained a record of the department's prior visits there, which showed service calls for domestic violence and drugs. The domestic violence involved J.B.

When deputies conduct a protective sweep, at least two enter a room together, then move in opposite directions and work their way around the room until they meet again, to be sure of covering all places where someone might hide.

Deputy Silva and Deputy Massaghi entered the previously locked bedroom to do the protective sweep there. Before they did, defendant made it clear that he did not want them to go in. By saying he had been discharged from parole, he revealed a felony background.

Argument

Defense counsel argued the deputies had not adduced articulable facts to justify a protective sweep of the locked bedroom. They did not see anyone going into, out of, or toward that room, which was visible at the end of the hallway. They knew before they went in whose room it was. Defendant gave them the key ("after a bit of coercion").

The Magistrate's Ruling

The magistrate found:

1. A protective sweep cannot be based on conjecture and speculation, but does not require probable cause.
2. It did not matter to the analysis that the bedroom was initially locked.
3. In deciding whether a protective sweep is necessary, deputies may rely on the totality of the circumstances and on their training and experience.

4. Based on the following facts, the deputies had articulated a legally sufficient basis for going into defendant's bedroom as part of the protective sweep:

Given J.B.'s searchable probation status, the complaint of illegal drug activity at the house justified a probation search of the premises even if J.B. was not present. The persons who tried to keep the deputies out thus had no standing to do so. They were verbally aggressive toward the deputies. Furthermore, the deputies' experience and training led them reasonably to suspect: that persons living in a drug house might have weapons on their persons or on the premises, and that there might be more people in the house than the deputies could initially see, since transients routinely enter and leave drug houses. For all these reasons, the deputies were justified in extending the protective sweep to defendant's bedroom, where they found contraband in plain view.

Therefore, the magistrate denied defendant's motion to suppress evidence.

B. The Motion to Dismiss the Information

Defendant conceded in limine that his section 995 motion challenged only the protective-sweep rationale for searching his room.

After the parties submitted on their moving papers, the trial court denied the motion. Based on the magistrate's factual findings (by which the court was bound), the deputies had sufficient grounds to execute a protective sweep "primarily due to the conduct of the occupants of the house upon the

initial entry," including "furtive gestures," "the lack of cooperation" from B.A., and "the fact that there was movement in the back of the residence." It was "both appropriate as well as prudent" to engage in a protective sweep to determine whether anyone was in the back bedroom.

DISCUSSION

When reviewing the denial of a motion to suppress evidence, we view the facts most favorably to the respondent and uphold the magistrate's factual findings if supported by substantial evidence. (*People v. Woods* (1999) 21 Cal.4th 668, 673; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223-1224.) However, we exercise our independent judgment as to whether, on the facts found by the magistrate, the search or seizure was reasonable. (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

One recognized exception to the warrant requirement for searches and seizures is the protective sweep exception. (*Maryland v. Buie* (1990) 494 U.S. 325, 327 [108 L.Ed.2d 276, 281] (*Buie*); *People v. Seaton* (2001) 26 Cal.4th 598, 632.)

A protective sweep can be justified by a reasonable suspicion that a dangerous person may be in the area to be swept. Probable cause to believe this is not required. (*People v. Celis* (2004) 33 Cal.4th 667, 678.) If officers doing a protective sweep see an item in plain view which they have probable cause to believe is evidence of a crime or contraband, they may lawfully seize that item. (*Buie, supra*, 494 U.S. at p. 330 [108 L.Ed.2d at p. 283]; *Arizona v. Hicks* (1987) 480 U.S.

321, 325-327 [94 L.Ed.2d 347, 354-355]; *People v. Clark* (1989) 212 Cal.App.3d 1233, 1238-1239.)

The parties agree that *People v. Ledesma* (2003) 106 Cal.App.4th 857 (*Ledesma*) is on point, but disagree whether it correctly states the law. We conclude that it does and justifies the protective sweep in this case.

In *Ledesma*, officers went to a residence to conduct a probation search based on information that Cindy Barajas, a known drug user on searchable probation, lived there. (*Ledesma*, *supra*, 106 Cal.App.4th at pp. 860-861.) The defendant, who appeared to be under the influence of drugs, responded to the officers' knock and admitted them, but said Barajas had not been there in a while. (*Id.* at p. 861.) He escorted the officers to the bedroom Barajas used when she was at home. (*Ibid.*) Before searching that room, the officers asked the defendant whether anyone else was in the residence; he said no. (*Ibid.*) Officer Rosin, who had extensive training and experience in narcotics investigation (*id.* at p. 862), said he wanted to do a "'security check for [the officers'] safety' to 'make sure nobody was going to sneak up behind [them] while [they] had [their] heads buried in a dresser drawer looking for items within [Barajas's] probation terms.'" (*Id.* at p. 861.) The defendant took the officers to his own bedroom. (*Ibid.*) As Officer Rosin looked around the bedroom, he saw the defendant walk up to a dresser in the room, grab what appeared to be bindles of methamphetamine, and slide them into the dresser drawer. (*Ibid.*) Observing a roll of money on the dresser top, Officer Rosin concluded that

the defendant was selling controlled substances. (*Ibid.*) After the defendant admitted the substance in the drawer was "crank," he was arrested. (*Id.* at p. 862.)

Affirming the trial court's denial of defendant's motion to suppress evidence, the appellate court observed: "Among the circumstances that are appropriately taken into account in evaluating a protective sweep are the type and location of the police action contemplated following the sweep. Here the officers were about to execute a valid probation search inside a house. [Fn. omitted.] *Buie, supra*, 494 U.S. 325, involved a protective sweep in the context of an arrest. Subsequent cases, however, have clarified that its holding is not limited to arrest situations. [Citations.] Furthermore, a respected treatise notes that when officers are rendering aid, they may conduct a protective sweep of the premises so long as the requirements of *Buie* are met. [Citation.] Thus, we conclude a security sweep may properly precede a probation search." (*Ledesma, supra*, 106 Cal.App.4th at p. 864.)

"The officers' safety concerns were increased by the probable duration of the search [and] the fact that it would occur on their 'adversary's "turf"' [citation] We reject the notion that a protective sweep is *always* justified prior to a search. However, a prudent officer will consider the safety concerns triggered by a search in determining the appropriateness of first conducting a sweep and a reviewing court must do the same." (*Ledesma, supra*, 106 Cal.App.4th at pp. 864-865.)

"Further, the type of criminal conduct underlying the arrest or search is significant in determining if a protective sweep is justified. The probation search in this case was based on search and seizure conditions in two different probation grants to Barajas, a convicted drug user. In addition, defendant, who Rosin reasonably believed shared the residence with Barajas, appeared to be under the influence of drugs when the officers contacted him. Thus, it was reasonable to conclude that the residence was the site of ongoing narcotics activity. Firearms are, of course, one of the "tools of the trade" of the narcotics business. [Citation.] In Rosin's opinion, based on his experience and training, drug users and those who associate with them are apt to have weapons in the house and have transients 'in and out of their house at all times of the day or night.'" (*Ledesma, supra*, 106 Cal.App.4th at p. 865.)

Here, as in *Ledesma*, the deputies came to a residence suspected to be a locus of narcotics activity to investigate a citizen complaint of such activity by performing a probation search; the subject of that search was known to have been involved in drug and domestic violence incidents at the residence. As in *Ledesma*, the deputies stated their purpose and its lawful basis, but were told by the occupants who answered the door that the person they sought was not there. As in *Ledesma*, the deputies could reasonably choose not to accept that claim at face value, but instead to enter and pursue their investigation. Furthermore, as in *Ledesma*, the deputies knew from their training and experience that the occupants of houses

where drug sales occur are likely to be armed or to have weapons within reach.

Unlike in *Ledesma*, the occupants argued with the deputies and refused to allow them to enter for up to a minute--long enough to let the person the deputies sought, or anyone else, hide in the part of the house not visible from the entrance. Under all the circumstances, this was ample reason to undertake a protective sweep on entry.

Once the deputies began the protective sweep, defendant continued to challenge them and interfere with them. When they encountered a locked bedroom they had not been able to see from the entrance, another occupant refused to say whose it was. Defendant finally admitted it was his, but would not surrender the key until the deputies threatened to break the door down. The fact that they had not seen or heard anyone entering or moving about the room was not reassuring, as it could have meant that someone had successfully concealed himself inside, ready to ambush them.

Citing federal circuit court decisions, defendant urges us to reject *Ledesma*'s extension of the protective sweep exception to probation searches. However, as defendant acknowledges, even some of the decisions he cites have applied the protective sweep exception beyond the *Buie* context of arrests inside a dwelling. (*U.S. v. Gould* (5th Cir. 2004) 364 F.3d 578, 584 [danger to officers required under *Buie* established by other circumstances]; *U.S. v. Taylor* (6th Cir. 2001) 248 F.3d 506, 513 [officer left behind to secure residence while others obtained

search warrant]; *U.S. v. Garcia* (9th Cir. 1993) 997 F.2d 1273, 1282 [suspect detained after officers entered residence with consent]; *U.S. v. Patrick* (D.C. Cir. 1992) 959 F.2d 991, 996-997 [protective sweep of bedroom after lessee gave consent to search other parts of residence]; *U.S. v. Daoust* (1st Cir. 1990) 916 F.2d 757, 758-759 [execution of search warrant on suspect with history of violence in isolated location].) Moreover, defendant does not explain why entry into a residence pursuant to a probation search, especially over the residents' objections, is inherently less likely to expose deputies to danger than is entry to effect an arrest.

Defendant asserts: "The *Ledesma* court . . . failed to acknowledge the two-prong analysis employed by the court in *Buie* and by other courts that have applied *Buie* in non-arrest situations. Moreover, the court in *Ledesma* performed only a cursory analysis of the distinctions between a probation search and an arrest which occurs inside of a residence." We are not persuaded.

Defendant asserts that officers conducting a probation search must reasonably believe the probationer has complete or joint control over the areas searched, and that *Ledesma's* holding "effectively eliminates the reasonable expectation of privacy retained by cotenants of probationers over areas that are not under the control of the probationer." However, both in *Ledesma* and here the officers could reasonably presume that a person on searchable probation for drug offenses who resides in a house where drugs are known or believed to be sold has at

least joint control of all areas of the residence. In any event, *Buie* teaches that occupants' reasonable expectation of privacy must yield to the minimal intrusion entailed by a protective sweep when the officers reasonably suspect that dangerous persons may be on the premises.

Thus, defendant's attack on *Ledesma* fails. We conclude *Ledesma* justifies the search done in this case.

Defendant separately asserts the officers lacked reasonable grounds to suspect that a dangerous person might be hiding in defendant's bedroom. However, his argument picks out isolated facts and characterizes them most favorably to himself, while ignoring the totality of the circumstances.

For instance, defendant asserts that if the occupants believed in good faith that a probation search is unlawful in the absence of the person on searchable probation, they could legitimately refuse the deputies entry; however, he ignores the deputies' testimony, impliedly found credible by the magistrate, that they thought the occupants were simply stalling, possibly to give others in the residence time to arm themselves or hide in ambush.⁶ Similarly, defendant notes that the deputies had not seen armed persons or weapons or heard anything to suggest the

⁶ Defendant cites the magistrate's characterization of the occupants' protest as "verbal," then concludes that the magistrate found it to be in good faith. However, the magistrate found that the occupants' protest was legally incorrect and the officers were entitled to take the occupants' "verbal" resistance into account in assessing the potential danger of the situation.

existence of such persons before they entered his bedroom; however, for the reasons we have already given, they could reasonably conclude that this was not grounds for reassurance and a protective sweep of the entire premises was the only way to allay their suspicion of danger.

Defendant's motions to suppress evidence and to dismiss the information were properly denied.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

RAYE, J.